

EXHIBIT E

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AR

**SUR REPLY UPON REHEARING
BY ANTHEM BLUE CROSS AND BLUE SHIELD**

Anthem hereby responds to the Affidavit of Petitioner Margaret McCarthy dated April 15, 2014 ("McCarthy Affidavit")¹ and states that the McCarthy Affidavit conclusively establishes that Ms. McCarthy's Petition was untimely and as a result, the Commissioner should reverse his Hearing Order and order Ms. McCarthy's Petition denied without the need of any further proceedings.

Specifically, Paragraph 2 of the McCarthy Affidavit,² in which Ms. McCarthy admits for the first time that, "[i]n mid-September, I became aware through media reports that the

¹ As stated in Anthem's counsel's email to the Department and counsel of record at 11:43 a.m. this morning, Anthem objects to the consideration of the McCarthy Affidavit because, like Ms. McCarthy's Reply To Motion For Rehearing, which was not signed and filed until well after the April 11, 2014 deadline set forth in the truncated schedule in the Commissioner's April 4, 2014 Ruling on Request For Rehearing ("Rehearing Order"), the McCarthy Affidavit was not filed in accordance with the Rehearing Order and in fact was submitted only after briefing, per the Rehearing Order, had been completed on April 14, 2014. The Petitioner's continued flouting of the Department's statutory procedure and the Commissioner's rulings should not be countenanced any longer. Anthem further submits that, as it argued in its several Standing Submissions, Ms. McCarthy had multiple opportunities to file such an affidavit supporting her position, but did not do so at any time within the timeframes ordered by the Department. It was only submitted inappropriately after Anthem's April 14, 2014 Reply Brief Upon Rehearing pointedly demonstrated that, in the absence of any affidavit from Ms. McCarthy, the Petition was indisputably untimely on its face. Its filing outside all of the Department's deadlines certainly should call into question the reliability of the Affidavit itself. Nonetheless, as discussed herein, to the extent the Department considers the belated filing, the McCarthy Affidavit actually confirms that the Petition was untimely.

² Paragraph 3 of the McCarthy Affidavit is of no importance to the timeliness issue under reconsideration because it simply verifies that Ms. McCarthy's policy in place in September 2013 was not affected by the

Anthem "Narrow Network" would not include my physicians or Frisbie Memorial Hospital", establishes that, well before the Petition was filed – and certainly more than 30 days before it was filed – Ms. McCarthy knew both that the Department approved Anthem's QHPs for the Exchange and that her own providers, including Frisbie, would not be included in the narrow network serving those Exchange plans. As is confirmed by the Department's August 1, 2013 Press Release, which is Exhibit 2 to Ms. McCarthy's own Petition, Ms. McCarthy was also on public notice of the fact that, on the Exchange, for those individuals who qualified, subsidies would be available to lower the cost of coverage. Consequently, by her own admission, Ms. McCarthy knew, as of mid-September, 2013, that, if she decided to pursue health insurance coverage through the Exchange, including if she were able to qualify for a subsidy, she would have to switch her treating providers.³

The Commissioner found that Ms. McCarthy has standing based on his determination that "[f]ederal subsidies under the ACA are available only to consumers who purchase marketplace plans. If Anthem's network were demonstrated to be inadequate, the injury of being forced to choose between a subsidized plan with an inadequate network and a more

Department's approval of the Pathway Network. As set forth in the Affidavit of Robert Benedetto submitted with Anthem's March 11, 2014 Second Supplemental Brief, Ms. McCarthy's Health Coverage would continue without change until its next renewal date of August 1, 2014. Likewise, Paragraph 4 of the McCarthy Affidavit is of no importance here because the information set forth there does not alter what Ms. McCarthy knew as of mid-September—it simply spells out what her specific options were going forward.

³ Of note, although Paragraph 2 of the McCarthy Affidavit does not identify a year, and does not identify the specific "media reports" she is referring to, it is reasonable to infer that she obtained the stated knowledge in September, 2013 and that the "media reports" are the same as, or similar to, the prominent September 18, 2013 news story referred to by the Commissioner in Footnote 3 at page 4 of his December 11, 2013 Order and those referred to by Anthem at page 5 of its April 14, 2014 Reply Brief Upon Rehearing, all of which report that Anthem's Exchange plans approved by the Department would not include Frisbie and its affiliated providers.

expensive plan with an adequate network, would be sufficient to show standing.”⁴ Given that conclusion,⁵ the McCarthy Affidavit makes it crystal clear that Ms. McCarthy was in the same position in mid-September, 2013 when she learned that Frisbie was not included in Anthem’s Pathway Network as she was at the time she filed her November 6, 2013 Petition and as she was on January 1, 2014 — i.e., she knew that, based on the Department’s July 31, 2013 Decision approving Anthem’s Pathway Network without inclusion of Frisbie, if she decided at some point to seek lower cost insurance — with the help of a federal subsidy — on the Exchange, she would have to do so under the care of providers that were new to her. Consequently, if she was in fact aggrieved for the reasons found by the Commissioner — which Anthem continues to dispute — Ms. McCarthy was likewise aggrieved in mid-September 2013 and on that basis — established by the McCarthy Affidavit — her Petition was unquestionably untimely.

Wherefore, for all the reasons set forth in Anthem’s Standing Submissions and those set forth in this and its earlier Rehearing filing, Petitioner McCarthy’s Petition was untimely and upon rehearing, the Hearing Order should be reversed and the Petition dismissed.

⁴ See the Commissioner’s March 28, 2014 Order and Notice Of Hearing at page 5 of 8.

⁵ Anthem continues to dispute the Commissioner’s finding that Ms. McCarthy has standing in the Hearing Order and the rejection of its bases for seeking rehearing on those issues in the Rehearing Order.

Dated: April 15, 2014

By 

Michael G. Durham
Donahue, Durham & Noonan, P.C.
741 Boston Post Road, Suite 306
Guilford, CT 06437
Tel (203) 458-9168
Fax (203) 458-4424
mdurham@ddnctlaw.com

CERTIFICATION

This is to certify that a copy of the foregoing was emailed, sent via facsimile and/or mailed, postage prepaid, on the above-written date, to:

Jeremy D. Eggleton, Esq.
Orr & Reno
45 S. Main Street
P.O. Box 3550
Concord, NH 03302-3550
jeggleton@orr-reno.com

Richard P. McCaffrey
Compliance and Enforcement Counsel
New Hampshire Insurance Department
21 South Fruit Street, Suite 14
Concord, NH 03301
richard.mccaffrey@ins.nh.gov

Attorney Maria M. Proulx
Associate General Counsel
Anthem Blue Cross and Blue Shield
1155 Elm Street, Suite 200
Manchester, NH 03101-1505
maria.proulx@anthem.com


Michael G. Durham